

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox

From: Natalie Bocanegra, Commission Counsel
John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Adoption of Amendment to Regulation 18707.1 (“Public Generally” Exception)

Date: April 26, 2004

I. EXECUTIVE SUMMARY

The Act¹ provides that a public official may participate in a governmental decision, despite the existence of a disqualifying conflict of interest, if the financial effect of that decision on the official’s economic interests will not be distinguishable from the decision’s effect upon the public generally. (Section 87103.) This rule is commonly referred to as the “‘public generally’ exception.”

In examining this exception for purposes of the general plan regulatory project, staff has identified possible amendments to clarify application of existing regulation 18707.1 (the general rule). These amendments are presented to the Commission to resolve issues of which staff became aware during discussion of this exception. Two versions of amendment to regulation 18707.1 are offered for the Commission’s consideration. Both versions clarify that the decision must *financially* affect the public official’s economic interest in substantially the same manner as it will affect the “significant segment.” In addition, the language specifies that the financial effect need not be identical to be considered financially affected in “substantially the same manner.” Version 2 differs in that it offers an additional way in which an official with a leasehold interest can determine the “significant segment.” Staff has received no formal comments regarding the proposed leasehold interest language in Version 2 and, during discussion at an interested persons’ meeting, received only mild support for this change due to issues regarding availability of leasehold information.

Staff recommends Version 1 because it clarifies that application of the “public generally” exception is based on a financial effects test. Staff does not recommend Version 2 since it would be infrequently applied due to unavailability of information.

¹ All citations herein are to the Government Code sections 81000 – 91014 unless otherwise noted. All regulatory citations are to Commission regulations at Title 2, sections 18109 – 18997, of the California Code of Regulations.

II. BACKGROUND

A. Eight-Step Conflict-of-Interest Analysis

The Act prohibits a public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Sections 87100, et seq.) A conflict of interest is based on the following questions:

1. Is the individual a “public official”?
2. Will the public official be making, participating in making, or influencing a governmental decision?
3. What are the public official’s economic interests?
4. Will one or more of those economic interests be directly or indirectly involved in the governmental decision?
5. Based on the applicable materiality standard, is the financial effect of the governmental decision on those economic interests “material”?
6. Is the material financial effect of the governmental decision on the public official’s economic interests reasonably foreseeable?

If the answers to all of the above are yes, then the public official will have a conflict of interest with respect to the governmental decision of his or her agency unless the following two questions can be answered in the affirmative:

7. Does the “public generally” exception apply?
8. Is the public official legally required to participate in the governmental decision? (Regulation 18700(b)(1) – (8).)

B. “Public Generally” Exception (All Economic Interests)

The Act provides that a public official may participate in a governmental decision despite the existence of a disqualifying conflict of interest if the financial effect of that decision on the official’s economic interests will not be *distinguishable from the decision’s effect upon the public generally*. (Section 87103; regulation 18700(a).)

The primary form of the “public generally” exception is embodied in regulation 18707.1 (the general rule) which has two components: (1) all, or a *significant segment*, of the public within the agency’s jurisdiction will be affected by the decision, and (2) the effect upon the public official’s economic interest will be in *substantially the same*

manner as the effect upon the significant segment. (Regulation 18707(b).) The regulation quantifies the term “significant segment,” but does not define “substantially the same manner.”

III. DISCUSSION OF PROPOSED REGULATORY ACTION

In examining regulation 18707.1, the general “public generally” exception, staff has identified possible amendments to clarify this regulation’s application. (Attachment 1.) Both versions of proposed regulatory language offer minor clarifying amendments but also specify that the financial effect on a public official’s real property need not be identical to the financial effect on the “significant segment” to be considered financially affected in “substantially the same manner.”

Version 2 of the proposed amendments additionally addresses how the “significant segment” may be determined when the public official has a leasehold interest. Under section 82033 and regulation 18233, an “interest in real property” includes a leasehold interest which is more than month-to-month. Therefore, a conflict of interest may arise for an official because the official has a lease. However, when applying regulation 18707.1, he or she must identify “property owners” or “homeowners” to determine the “significant segment” rather than other persons who also have similar leasehold interests.

Version 2 would provide an official possessing a leasehold interest the option of applying an alternative rule for determining the significant segment. In addition to the general rule for determining a significant segment, this version would define a “significant segment” for an official’s economic interest in a lease as ten percent or more of all persons having a leasehold interest in the official’s jurisdiction or district, or, in the alternative, 5,000 persons having leasehold interests in the official’s jurisdiction.

Where a public official has such lessee information at hand, it seems unfair to preclude the official from comparing financial effects on him or her with the effects on other persons holding leases. However, during discussion at an interested persons’ meeting, language presented in Version 2 received mild support due to issues regarding availability of leasehold information. It appears that because information relating to property owners is more readily available, a special leasehold rule would only be applied infrequently.

Staff Recommendation: Staff recommends Version 1 because it clarifies that application of the “public generally” exception is based on financial effects. Staff does not recommend Version 2 since, in all probability, it would be applied infrequently.